EASTern Shore

BEFORE THE ENVIRONMENTAL APPEALS BOARD

FOR THE STATE OF DELAWARE

ADRIENNE HEGMAN, Appellant, v. SECRETARY OF THE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL, CONTROL OF THE STATE OF DELAWARE, AND EASTERN SHORE ENVIRONMENTAL, INC., Appellees.	)	Appeal No. 2000-10

DECISION AND ORDER

Pursuant to due notice of time and place of hearing served on all parties in interest, the above stated cause came before the Environmental Appeals Board on March 12, 2002, in the Auditorium, Richardson & Robbins Building, 89 Kings Highway, Dover, Kent County, Delaware.

PRESENT:

Robert Erhlich, Acting-Chairman

Peter McLaughlin, Member

Stanley Tocker, Ph.D., Member

Gordon Wood, Member

Kevin R. Slattery, Attorney for the Board.

APPEARANCES:

Jeremy Homer, Esquire, for the Appellant, Adrienne Hegman, and the DSWA
John Paradee, Esquire, for the Appellee, Eastern Shore Environmental, Inc.
Kevin Maloney, Deputy Attorney General for the Appellee, DNREC
Capt. Carey Merrill, Esquire, for the Dover Air Force Base

A hearing was held before the Environmental Appeals Board ("Board") on March 12, 2002, pursuant to the parties' request to have several pre-hearing motions considered by the Board. Each motion was argued in turn and considered by the Board at the conclusion of all the arguments.

1) **Motion to Dismiss for Lack of Jurisdiction**

Eastern Shore Environmental, Inc. ("ESE") contends that the appeal should be dismissed because 7 Del. C. § 6007(c) requires the Board to conduct a hearing within180 days of the appeal being filed or else the decision of the Secretary of the Department of Natural Resources and Environmental Control ("Secretary") shall be final. The language in the statute is mandatory and not directory. There was no agreement to stay the appeal pending the finality of the Court of Chancery litigation. During a teleconference between counsel on February 2, 2001, counsel for the Delaware Solid Waste Authority ("DSWA") and Hegman contended the Board could not grant the stay in the first place. Hegman contended the stay was done in an ex parte manner. On November 15, 2001, counsel for DSWA and Hegman again raised the ex parte nature of the granting of the stay. These contentions do not suggest that there was an agreement to stay the appeal. Even if there was an agreement, it would merely have delayed the inevitable since the scheduled hearing would have been outside the 180 day window.

Hegman argues in response that the hearing must begin within 180 days unless the parties agree otherwise. Counsel argues that the term "shall" in this context is not mandatory but rather directory. Even ESE's caselaw indicates otherwise. The Board must look at the context of the case to decide whether it is mandatory or directory. Therefore,

if either party wants to proceed, they have the ability to do so. Exhibit A of Hegman's brief is an express letter from ESE that the matter is stayed. Furthermore, the hearing was scheduled during the 180 day period. While Hegman objected to the ex parte process (ESE sent a letter to Board's assistant without copying the other parties), she did not object to the stay itself. Therefore, Hegman tacitly agreed to the continuance. Hegman did not argue that the 180 day period should be followed. As to the original date of the hearing being outside the 180 day period, it is not the first instance where this has occurred. It was not the intent of the statute to subject the Board's decision to attacks based upon the lapsing of this time frame. In any event, the stay itself was granted within the 180 day period.

Hegman further contends that she did not agree to a stay until the conclusion of the Court of Chancery matter. She did wait a while in the hope that the Court of Chancery or Kent County Levy Court would resolve the matter. ESE, however, pulled its application at the eleventh hour, and this caused the delay.

The Dover Air Force Base ("DAFB") declined to comment as they are not a party at this time.

The Department of Natural Resources and Environmental Control ("DNREC" or "Department") is taking a position that all the arguments in this matter have been, and will be, made by the other parties. The Department will vigorously defend the decision to grant the permit on the merits.

In rebuttal, ESE states that there was no agreement. A party cannot tacitly agree to something by inaction. Second, the language fixes a consequence of failure--therefore

it is mandatory.

2) **Motion to Dismiss for Lack of Standing**

On the second motion to dismiss, ESE contends Hegman doesn't have standing to bring her appeal. Under 7 Del. C. § 6008(a), she must have a substantially affected interest. In accordance with the Oceanport case (Oceanport Industries, Inc. v. Wilmington Stevedores, Inc., 636 A.2d 892 (Del. 1994)), this means she must have sustained an injury-in-fact. In this case Ms. Hegman has suffered no injury-in-fact. She lives 1.7 miles from the site, and thus, she cannot hear, see or smell the site. In her affidavit, Mrs. Bergold states she cannot hear, see or smell it, and Mrs. Bergold lives within close proximity of the site. Ms. Hegman's contentions are no better than any that could be raised by the general public: there is no particularized injury she has raised.

Regarding the flight safety concern, ESE argues that this does not confer standing as it is too conjectural--too speculative. The flight safety concern is outside the zone of interest protected by the statute. The statute is intended to regulate environmental degradation--not flight safety. Furthermore, ESE's trucks will still come through Little Creek even if the permit is not granted. The remedy is not going to solve her problem. In addition, the failure to raise the flight safety issue in the appeal precludes her from raising it now. (Citing Board Regulation 102(a)).

In reply, Hegman contends that she has standing pursuant to Oceanport. She does not have to show a present injury-in-fact. This is not possible considering that the permit has just been issued. This permit has a huge capacity: more waste than all Kent County produces in a year. Ms. Hegman lives within 1.3 miles of the site. Under Oceanport, it is

sufficient that she may suffer injury at some future date. The Riverview Farm case is in point. Ms. Hegman lives within a block of the route the trucks take to get to the site. Furthermore, 7 Del. C. § 6001(a)(5) applies to the odor condition that will attract birds and creates a flight safety issue. Thus the statute recognizes the flight safety issue. The affidavits of other neighbors to the facility do not establish that Ms. Hegman will not be affected. Of the eleven affidavits, eight are from people who live farther away from the site than Ms. Hegman.

In rebuttal, ESE contends that the Oceanport case says the opposite of what Hegman contends. Even today, two years after the permit issued, Ms. Hegman has not shown an injury. It is speculative she ever will. The Tate case (Tate v. Miles, 503 A.2d 187 (Del. 1986)) is not controlling since it was uncontested that the harm would eventually come about. The "substantially affected" standard in section 6008(a) is a heightened standard than the normal standing requirement set forth in Tate.

3) **Motion to Intervene by the DAFB**

On the motion to intervene by the DAFB, the DAFB contends that it can intervene as a matter of right or by permission. The bases for this are not contested by ESE. Under Board Regulation 106, the Board must proceed in a manner not inconsistent with its rules. The rules are intended to allow full and fair consideration of the actions of the Secretary. Flight safety is an environmental issue and must be considered. Contrary to ESE's contention of untimeliness, there are no time limitations set forth in the statute for intervention. The Board's rules and the rules of other Delaware courts also have no reference to a time limitation. As for the 20 day time limitation for appeals to the Board,

this is not a statute of repose. It is a statute of limitations that requires *someone* to challenge the Secretary's decision. Once someone raises the challenge, the door is open for others to bring their concerns to the floor. Furthermore, nothing in Rule 24 requires standing to be established in order for someone to intervene. They need only assert a claim (not prove it) of an impact.

The decision of the Board would affect DAFB's ability to protect its interest because of potential air strikes by birds. No other party adequately represents the DAFB's interest. The DAFB is a direct neighbor--within 1500 feet. The ESE facility is a putrescible waste processing facility, and that is a bird attractant. The DAFB cannot control ESE's facility and how that operation will affect the flight safety concerns. The Secretary's decision was based upon ESE's representation that DAFB would be "minimally impacted" by the facility. That is not accurate. The mandate of DNREC is to make sure the facility is properly located, designed and operated.

With regard to permissive intervention, DAFB contends there are similar issues of fact and law in common, and the intervention would be without prejudice to ESE. The burden on ESE to prove there would not be a flight safety concern or any environmental concerns is not unduly prejudicial. ESE has been aware of the concerns and objections of the DAFB for quite a while. It is up to the Board to decide the issues. The intervention would not extend the Board's jurisdiction. It is permitted to review all actions of the Secretary, and that is what the Board would do here. It's regulations permit the introduction of additional evidence.

In response, ESE challenges the premise and timing of the intervention. The motion

to intervene is not timely as it was filed 18 months after the filing of the appeal. The DAFB was on notice and aware of the permit application. The DAFB did not file an appeal or move to intervene shortly after the permit was granted. Just because they appeared before the Levy Court on the zoning issue does not put ESE on notice. ESE has been operating for two years without incident and the DAFB cannot show an impact.

ESE contends that 7 Del. C. § 6008(a) is a statute of repose--it is jurisdictional. (Citing the CCOBH case (Council of Civic Organizations of Brandywine Hundred v. New Castle County, 1993 WL 390543, Hartnett V.C. (Del. Ch. 1993))). An intervener cannot extend the jurisdiction or expand the scope of the action. (Citing the Simmons case (Simmons v. Interstate Commerce Commission, 716 F.2d 40 (D.C. Cir. 1983))). Because Hegman's notice of appeal did not raise the flight safety issue the DAFB is precluded from doing so here. Also, chapter 60 and DNREC's regulations do not address flight safety issues--only environmental degradation. The issue is not within DNREC's zone of regulation. It is prejudicial because ESE has to defend an issue not raised in a timely manner. Furthermore, they have to prove a negative--that there are no birds.

On questioning by the Board, the DAFB indicated that they were not sure of their options when they learned of the ESE permit. They were not aware of the EAB appeal or the Court of Chancery action until the notice was received from the Kent County Levy Court regarding consideration of ESE's conditional use zoning application. Once the application was withdrawn, they had to consider other forums in which to raise their issues. Also, the legal notice of the permit application in the newspaper was not adequate. It did not indicate the ESE facility's proximity to the DAFB. The notice did not give appropriate

indication that operations under the permit might affect the DAFB. ESE did not use a "good neighbor" approach. Furthermore, the showing is not just "prejudice" but "undue prejudice".

Hegman argues that this case is still at an early stage as there has been no pre-hearing conference. This proceeding was stopped early on, and despite the passage of time, not much has happened. The flight safety issue is a concern to Ms. Hegman.

In rebuttal, ESE argues that the DAFB started expressing its concerns with the ESE site in April of 2001–nine (9) months prior to filing its motion to intervene. They still waited too long. ESE concedes there is no statutory or regulatory requirement that a potential party file a motion to intervene by a date certain. ESE mirrors DNREC's concerns that the intervention will open the door to parties avoiding the statute of limitation. The Board's regulations require "clarification" of issues--not expansion of those issues.

4) **Motion to Intervene by the DSWA**

On Delaware Solid Waste Authority's ("DSWA") motion to intervene, the DSWA argues that the Board's appeal statute is not a statute of repose. (Citing the Riedenger case (Riedenger v. Board of Adjustment of Sussex County, 2000 WL 331143454 (Del. Super. 2000) and CCOBH)). In comparing analogous statutes, statutes of repose prohibit any action being brought after a designated time frame. Title 7 is closer to the statute analyzed in Riedenger which did not conclusively prohibit the action. The DSWA's interest is based upon the size of the ESE facility under the new permit. It will cause the DSWA problems in enforcing its program under chapter 64. The DSWA's regulations control the passage of waste throughout the state by truck traffic. There is a monthly report

requirement that is necessary in order to determine where waste originates. While ESE contends this requirement is not applicable to its operation, DSWA disagrees and contends that the reports assure that ESE does not put transferred waste (from out of state) in a DSWA facility. In issuing the ESE permit, DNREC did not enforce its own regulations pertaining to additional truck traffic, geological and hydrogeological assessments and zoning. Both chapter 64 and DNREC's statutes need to be construed *in pari materia*.

In response, ESE contends the Riedenger case is distinguishable. In Riedenger the interveners were clearly parties in interest. That is not the case here. By its own admission, the DSWA had notice of the permit decision and proceedings and chose not to appeal. Furthermore, the DSWA's interests can be adequately addressed through Ms. Hegman's appeal. There is no prejudice in the absence of the DSWA. Any prejudice would be self-inflicted as they chose to file the appeal in Ms. Hegman's name. Whether it is a statute of repose or limitations depends on whether it is jurisdictional. Section 6008(a), is jurisdictional. The Board cannot operate without a properly exercised appeal. One must ask why the DSWA is here as it is not a neighbor and has raised no issue of environmental degradation. They are a competitor with only an economic interest. (Citing Oceanport). Chapter 60 does not regulate the ESE. ESE's facility does not affect DSWA's ability to implement a state-wide solid waste disposal plan. The DSWA may regulate trucks going to its facilities, but because ESE does not take any waste to DSWA facilities, ESE is not regulated by the DSWA. Even if permitted to intervene, the DSWA cannot interject new issues because the issues have already been established in Ms. Hegman's appeal.

In reply, the DSWA argues that it did not file its appeal through Ms. Hegman. The Oceanport case does not stand for the proposition that a economic competitor cannot have standing to intervene. Only if the motivation is purely economic can intervention be denied. If there is mixed motivation, then the situation is different. The DSWA disputes whether ESE is filing monthly reports with DNREC. Furthermore, ESE's failure to file reports with the DSWA does not mean the DSWA lacks authority to require them or enforce its own regulations.

DNREC contends that a fair reading of 7 Del. C. § 6008(a) requires finality of the parties to any appeal and the issues to be considered by the Board.

5) **Motion to Lift the Stay**

On Hegman's motion to lift the stay, it is argued that there is a present flight safety risk and the hearing should not be further delayed. DNREC has scheduled a hearing on Hegman's request to stay the permit due solely to the flight safety issue. The statute permits new evidence. (Citing the Spano case (T.V. Spano v. Wilson, 584 A.2d 523 (Del. Super. 1990) for the proposition that it is a denial of due process to limit an appeal hearing only to the evidence before the Secretary). It is unreasonable to interpret the Board's regulations to expect a party to include every possible issue in a notice of appeal. This is particularly true where there were no proceedings below in which those issues could be raised. Hegman also relies on Board Regulation 103(6) for the proposition that issues may be raised at the pre-hearing conference. (Citing to Exhibit L of Hegman's Reply Brief–an express discussion of the bases for the rule at the time of its promulgation). The Board's rules require a statement of appeal only. (Citing to Board Regulation 105(c)).

Hegman further argues that the Court of Chancery case will not resolve all the issues in this appeal, and it will not be resolved in an expeditious manner. Therefore, the appeal needs to proceed.

In reply, ESE argues that the new issues cannot be raised in this appeal. Nothing raised in the original notice of appeal is so urgent to require the stay to be lifted. Board Regulation 105(c) does not contemplate that the Secretary has held a hearing where all the issues have been considered. It applies regardless of whether the Secretary has held a hearing or not. Both the DSWA and Ms. Hegman could have requested a hearing before the Secretary but did not request one. Furthermore, the purpose of the pre-hearing conference is to clarify the issues--not bring in new issues. The Spano case is not on point.

ESE further argues that the Board should continue the stay because it does not have the expertise to adjudicate a zoning issue. Moreover, Kent County is an indispensable party to the zoning issue and is not a party to this appeal. Judicial economy dictates the continued stay and there is a concern of inconsistent decisions. The Board should defer to the Court of Chancery. Furthermore, the Secretary is going to address the flight safety issue in two days. Therefore, the Board should wait and see what the Secretary does on the flight safety issue. The Secretary can stay the permit, but he cannot revoke it.

DNREC asserts that Ms. Hegman and the DSWA had every opportunity to request a hearing before the Secretary. No hearing request was made. They also had a post-decision opportunity to request an appeal. DNREC reads the Spano decision more

narrowly. In Spano, an enforcement case, there was no opportunity for a hearing. Here, there were two opportunities. Furthermore, the issue of flight safety may not be ripe for the Board's review at this time because of the Secretary's review of that issue.

In response, the DSWA contends DNREC had promised to keep them informed of all permit applications for the ESE facility, and they relied upon that to their detriment and were not notified. While Spano was an enforcement action, the statute only distinguishes between case decisions and rule making. Section 6008 does not say anything about limiting the scope to only previously considered evidence. Pursuant to the holding in the Raytheon case (Tolou v. Raytheon Service Co., 659 A.2d 796 (Del. Super. 1995)), the Board may consider new evidence. Furthermore, Board Regulation 103(a)(6) does not state to "clarify" issues but to "identify" issues.

6) **Motion *in limine* on the Flight Safety Issue**

On the flight safety issue, Hegman argues that the possibility of an airplane crash raises an environmental issue. With such an event there is air and water pollution. Furthermore, it is not "too remote" a possibility and it is not necessary to establish a certainty of harm. Ms. Hegman's interest is environmental: she doesn't want a plane crash near her home. Fundamentally, it is a problem putting a transfer station near a nationally important runway.

In response, ESE argues the issue is not before the Board as it was not raised in the original appeal. Furthermore, the risk is too speculative. It is not in the zone of interest that can be addressed by DNREC and the Board. It is prejudicial to ESE to raise these issues at this point.

The DAFB argues that flight safety goes to the merits of the case. The issue is whether the Secretary's decision was proper. By changing their land use, ESE is doing so in a manner that will affect animal behavior. This must be considered.

DNREC argues that an appellant cannot frame an appeal issue too broadly. Such is the case when an appellant states the issue is whether the Secretary's decision is improper. The whole purpose of the notice of appeal is to give the Secretary notice of the specific bases of objection.

In rebuttal, Hegman argues that it is not the intent of the statute simply to give the Secretary notice. This is the most important issue in this case.

7) **Motion *in limine* on the Zoning Issue**

On the motion regarding zoning evidence, Hegman argues that the issue before the Board is different than that in the Court of Chancery. There is a factual dispute as to what Kent County told DNREC. The Court of Chancery case involves ESE raising an equitable estoppel argument regarding the County's enforcement of its zoning regulations. The issue here is different. DNREC must determine whether the appropriate zoning is in place. The proof of the zoning must be submitted with the application. Here, ESE requested that letter of approval, however, that letter never materialized. None of the "he said", "she said" situation would have occurred had DNREC obtained the necessary form of the proof for the zoning. (Citing Friends of the Nanticoke v. DiPasquale, 2001 WL 1628466, Graves, J. (Del. Super. 2001)). The Board review has nothing to do with whether--ultimately--the zoning was appropriate or not. The issue is whether DNREC followed the appropriate procedures.

ESE contends that this matter should be put on hold until it is resolved by the Court of Chancery. ESE relied upon the representations of Kent County to obtain the permit. No written statement was required. Under 7 Del. C. § 6003(c)(1), proof--not necessarily written proof–is required. In the Friends of the Nanticoke case, the application itself was deficient. Here, the application was complete. ESE concedes that the issue is whether DNREC complied with the requirements of the permitting process. The Board must examine DNREC's regulations and determine whether they were followed: not whether the zoning itself was appropriate.

In rebuttal, Hegman contends that the Friends of the Nanticoke case did not address an issue of standing. The issue was whether the agency properly followed the permitting process. It is DNREC's requirement–not Kent County's requirement. There must be something in writing, and the agency cannot simply accept an oral representation. DNREC cannot ignore its own regulatory requirement. Eventually, Kent County took the position that the zoning was not appropriate.

The DAFB argues that Kent County has indicated the grandfathered use of the ESE facility was being expanded under the new permit. The issue, however, is whether the processing of the application by DNREC was proper in relation to the zoning aspect.

DNREC argues that it was not until after the permit was issued that Kent County began to question the zoning. DNREC concedes there was no writing, however, the issue is the form of evidence and not whether the zoning was correct. There is no need for additional testimony on this issue: the affidavit of Janice Manchester should suffice. Hegman, however, contends she is entitled to submit the evidence that supports her

position.

8) **Motion *in limine* on Appellant's Motivation for Filing the Appeal**

On the final motion regarding the motivation for filing the appeal, Hegman argues that this is simply a means to harass Ms. Hegman. In response, ESE contends that credibility is a concern related to Ms. Hegman's standing. Hegman, in rebuttal, argues her motivation is not relevant to the issues in the case. (Citing the Oceanport case).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having considered all the arguments of the parties (and potential parties) and their accompanying briefs and memoranda, the Board ruled on each respective motion for the reasons which follow.

1) **Motion to Dismiss for Lack of Jurisdiction**

By unanimous vote, the Board denies this motion. The facts surrounding the procedural course of this appeal are somewhat confusing due to a lack of written confirmation by the Board of certain events. What the Board has determined is the following. On July 19, 2000, Ms. Hegman perfected her timely appeal to the Board. The parties were notified of the filing by letter dated July 20, 2000. On July 31, 2000, counsel for ESE and counsel for the Board spoke over the telephone regarding ESE's status in the case, and it was suggested that ESE file a motion to intervene as a party in interest. At this point in time, the hearing had been tentatively scheduled for one of the Board's two hearing dates in November, 2000. For reasons the Board has been unable to determine at this time, the tentative November hearing date was never confirmed. ESE's Motion to

Intervene was filed on or about August 14, 2000, and the DSWA filed its Motion to Intervene on or about August 18, 2000. Shortly thereafter, on August 24 and September 11, 2000, ESE and DNREC, respectively, filed their objections to the DSWA's Motion to Intervene. On October 12, 2000, counsel for ESE requested a stay of the appeal proceedings in order for a parallel Court of Chancery action to resolve some of the similar issues raised in the appeal. That request was copied to DNREC's legal counsel but not Ms. Hegman's legal counsel. Thereafter, on December 8, 2000, the appeal was scheduled to be heard on April 10, 2001. At the Board's meeting of December 12, 2000, the Board granted ESE's Motion to Intervene and granted the request for the stay. Counsel were notified by telephone the following day of the Board's actions. No formal form of order was issued by the Board. The hearing scheduled for April 10, 2001 was taken off the Board's scheduling docket.

Pursuant to 7 Del. C. § 6007(c), the Board "shall conduct, but not necessarily complete, the hearing within 180 days following the receipt of the appeal unless the parties agree otherwise." It is not an unusual situation for the Board to conduct a hearing outside the 180 day time frame established by statute. If a hearing is scheduled to be heard outside the 180 day time frame, it is *per se* by agreement of the parties, as all the Board's hearings are scheduled with the agreement of the parties. If a party, counsel or essential witnesses are unavailable on a particular date, efforts are made to re-schedule in order to accommodate those schedules to a reasonable degree. In a fair number of cases, this occurs outside the 180 day time frame.

It is also not unusual for the parties to request continuances, stays or--what has

developed in EAB practice as--the "indefinite stay". Typically this is done with the consent of the parties. In this case, however, we have the atypical situation where the Board granted a stay (within the 180 day time frame) at the request of a party without the express agreement of the other parties to the case. In fact, it was done without the knowledge of the appellant, Ms. Hegman. According to the representations made by Ms. Hegman's counsel, when she discovered the stay had been granted (after the fact) she did not initially object. It was not until it became apparent that the Court of Chancery action was not going to resolve the similar issues in a timely fashion that Ms. Hegman presented her motion to have the stay lifted.

Before the Board is a motion to dismiss the appeal by the same party that requested the Board to stay the action in the first place. ESE argues that because the Board did not conduct the appeal hearing within the 180 day time frame it no longer has jurisdiction to entertain the appeal. The Board finds this argument to be somewhat disingenuous given that ESE requested the stay that caused the delay it contends has divested the Board of jurisdiction. Moreover, ESE is seeking to have the appellant's appeal dismissed due to a delay it requested–a request ESE did not feel the necessity of which to inform the appellant. While neither party has raised the theory, the Board concludes that the actions of ESE in requesting (and subsequently receiving) the stay operate as an estoppel to raising any jurisdictional time bar. See Coates, Int'l, Ltd. v. DeMott, 1994 WL 89018 (Del.Ch. 1994)(for the proposition that the doctrine of judicial estoppel precludes a party "from asserting in a legal proceeding a position inconsistent with a position previously taken by him in the same or in an earlier proceeding."). Alternatively, the actions of ESE

in requesting (and subsequently receiving) the stay would toll the running of any statute of limitations. See e.g., Watts v. Hanson 1994 WL 714001 (Del. Super. 1994); Mergenthaler v. Asbestos Corp. of America, 500 A.2d 1357 (Del. Super. 1985).

Even were the Board to conclude there is no estoppel effect or tolling of the statute, it further concludes that there was a tacit agreement between the parties regarding the stay of the proceedings. A tacit agreement is going to be found in the intention of the parties and may be inferred from their conduct under the circumstances presented. See Thomas v. Kempner, 1977 WL 2586 (Del. Ch. 1977). Where one party does not object to an action taken by the other party without the former's express consent, and where the non-objecting party would have no reason to object, a tacit agreement to the action taken can be inferred. Accord DCSE/ Marguerite McKelvy v. Kathyrn and Samuel Doochack, 1997 WL 295711 (Del.Fam.Ct. 1997); see also Hanna Systems v. Capano Group, L.P, 1985 WL 21128 (Del. Ch. 1985). Here, one party requested the stay, and the other party (when it found out about the granting of the stay) did not object to it. No appeals were pursued by any party at the time the 180 day period expired. Furthermore, it must be presumed that ESE was aware of the requirements of section 6007(c) at the time it requested the stay, and therefore, ESE is imputed with the knowledge that it needed an agreement of the parties in order to have the stay granted. Under these circumstances, and in the interests of justice, the Board must infer that a tacit agreement existed when the stay was granted.[1]

[1]Given the Board's ruling on the foregoing bases, it does not address the question of whether the statutory language contained in 7 Del. C. § 6007(c) constituted a mandatory or directory provision.

2) **Motion to Dismiss for Lack of Standing**

By unanimous vote, the Board denies this motion. On the second motion to dismiss, for lack of standing, the legal standard is set forth in the case of Oceanport Industries, Inc. v. Wilmington Stevedores, Inc., 636 A.2d 892, 900 (Del. 1994). In ceanport, the Court established a heightened standard for reviewing the standing of a party to an appeal before the Board. An appellant before the Board must show an interest greater than that shared by all Delaware citizens. An economic interest alone, or general environmental impact allegations, are not sufficient. Oceanport, at 900, 905. The Court found there must be an injury-in-fact or the "invasion of [a] legally protected interest." Oceanport, at 904. That injury must also be concrete--actual or imminent--and not conjectural or hypothetical. Id. Based upon the allegations set forth in the complaint, the Board finds that Ms. Hegman has standing to proceed with her appeal.

This case is in a different procedural posture than that reviewed in Oceanport. The motions to dismiss in this matter are presented as pre-hearing motions on the pleadings and for the Board to consider corresponding legal arguments. Unlike Oceanport, there has been no public hearing in this matter before the Secretary, and the Board has yet to consider any evidence. While the parties have submitted various affidavits in support of their respective positions, the Board is reluctant to consider them, and thus, consider this motion as the equivalent of a motion for summary judgment. The understanding of the Board was that today's hearing was intended to address a few pre-hearing motions with their accompanying "brief" submissions of memoranda of law (the latter having been disregarded by all). In the spirit of that understanding, the Board is treating this motion as

a motion to dismiss on the pleadings. Brown v. Colonial Chevrolet Co., 249 A.2d 439 (Del. Super. 1968).

When addressing a motion to dismiss on the pleadings, the fact-finder must consider the allegations contained in the complaint to be true. Spence v. Funk, 396 A.2d 967 (Del. 1978); see also Fagnani v. Integrity Fin. Corp. 167 A.2d 67 (Del. 1960). In considering this motion, it is not the function of the Board to decide issues of fact. Id.

In her Statement of Appeal, Ms. Hegman alleges, in part: that she resides in "close proximity" to the ESE facility; that the enjoyment of her residence will be significantly diminished by "noise, traffic, disruption of life, inconvenience, odor and pollution resulting from the proposed facility...."; and, that the Secretary's decision was issued in violation of the Department's regulations. These allegations were similar to those raised by the plaintiffs in the case of Riverview Farm Associates, et al. v. Board of Supervisors, Charles City County, et al., 528 S.E.2d 99 (Va. 2000). The Board finds the precedent from the Virginia high court persuasive on this motion. As here, the court in Riverview Farm Associates considered only whether the factual allegations of the complaint were sufficient to state a cause of action. The Riverview Farm Associates court found that the plaintiffs lived within sufficiently close proximity to the re-zoned industrial property to possess a "justiciable interest" in the litigation. Riverview Farm Associates, at 103. In that case, the court held the plaintiff's were entitled to present evidence to support their allegations regarding the conditions concerning the truck traffic and that the re-zoning was not in conformity with the county comprehensive zoning plan. Riverview Farm Associates, at 105. We also find that given the allegations in her Statement of Appeal, Ms. Hegman has

alleged a "substantially affected" interest, and accordingly, she has standing to proceed on her appeal and present evidence in support of her allegations.

3) **Motion to Intervene by the DAFB**

By unanimous vote, the Board grants this motion. The Board concludes that the DAFB has a substantially affected interest in this matter and that its intervention should be granted as a matter of right. Alternatively, the DAFB has satisfied the requirements for a permissive intervention. The Board agrees with the DAFB's argument that 7 Del. C. § 6008(a) is a statute of limitations and not a statute of repose. See Riedenger v. Board of Adjustment of Sussex County, 2000 WL 33114345 (Del. Super. 2000)(comparing the similar provision of 9 Del. C. § 6918 to the statute of repose cited in the CCOBH case). As Ms. Hegman has perfected a valid appeal before the Board, intervention is possible by any potential party with an interest in the matter upon timely application. See Riedenger, supra.

ESE contends that the application by DAFB is not timely and its intervention would be unduly prejudicial. The Board finds that the application is timely. While a significant period of time has elapsed since the initial appeal was filed, the matter has not proceeded past the initial stages of the appeal due to the stay. The Board has not conducted a hearing on the merits, and there has been no pre-hearing conference. At most, the DAFB has missed some teleconferences between legal counsel dealing with these pre-hearing motions. As it has participated in today's proceedings to the fullest extent, its application is quite timely. Moreover, as the Riedenger court noted, "[p]arties have been permitted to intervene at nearly any point in a case...."

While the Board would agree that the inclusion of the DAFB in these proceedings will place an additional burden on all the other parties, its intervention is not unduly burdensome or prejudicial. DAFB alleges it did not have sufficient notice of the permit application and how it could impact upon its operations. It alleges that once it received direct notification from the Kent County Levy Court of the proposed conditional use application, it became actively involved in having its position considered. Assuming the earliest that ESE was aware of the DAFB's intent to become actively involved was the public hearing on the conditional use, ESE has been addressing the DAFB's concerns since June of 2001. Furthermore, the DAFB, the DSWA and Ms. Hegman have requested that the Secretary stay the permit pending consideration of the flight safety concerns. The Secretary has authorized a public hearing on the stay in order that a hearing officer can consider the flight safety concerns. That hearing will commence in two days time and likely will be a multiple day hearing.[2] While there is a possibility that the parties may have to duplicate some of that testimony before the Board, by the time the Board's opinion issues, they will already have undertaken the majority of the effort involved in addressing the DAFB's concerns in an administrative forum. For the most part, the question of any undue burden will be moot.

The Board finds that the DAFB has a substantial interest in this matter that only the DAFB has the ability to fully protect. Due to the proximity of the ESE facility to the DAFB's primary runway, and the risk involved in storing putrescible waste–a known bird

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[2]Since the hearing on the motions, a two (2) day hearing was held before the hearing officer on the stay issue. Briefing concluded at the end of April, and no decision has issued.

attractant–in such close proximity to the DAFB, the DAFB is the party that will be most affected by the operations of ESE under this permit. The risk of an accident caused by a bird/plane encounter is an environmental concern, in part, given the large quantities of fuel carried by transport planes. While Ms. Hegman's concerns may include a flight safety hazard, her primary allegations aim at nuisance and pollution issues surrounding increased truck traffic to the ESE facility. If the DAFB is not involved in this proceeding, it is unlikely that Ms. Hegman is going to take the time, or marshal the resources, necessary to present the evidence to establish the flight safety concerns raised by the DAFB. Consequently, the DAFB's interest will be impaired without an adequate presentation of its position.

ESE further contends that the DAFB cannot interject a new issue into the appeal that was not raised in the initial appeal document. The Board rejects this argument. Section 6008(a) provides that all parties to the appeal "may produce competent evidence in their behalf." There is nothing in the statutory language to prohibit a party from interjecting an issue into an appeal that was not initially raised in a Statement of Appeal. And while Board Regulation 102 requires the Statement of Appeal to contain "sufficient specificity to notify the Board and [DNREC] of the reasons for the appeal", there is, again, no prohibition against interjecting additional issues not initially raised in a Statement of Appeal. In Regulation 103, the pre-hearing conference is conducted, in pertinent part, to "(6) [i]dentify issues."

The Board further concludes that it has the ability to expand upon whatever record comes to it from the Secretary. Tulou v. Raytheon Serv. Co., 659 A.2d 796 (Del. Super. 1995). In this situation, however, there was no public hearing below. The Board has an

obligation to afford the parties a "full opportunity to present evidence on the subjects which are relevant to the merits of the Secretary's order." T.V. Spano Bldg. Corp. v. Wilson, 584 A.2d 523, 530 (Del. Super. 1990). Given the limited record in this case, and given that the Board will be conducting the initial public hearing on this matter, the Board concludes that the flight safety issue is relevant to the merits of the Secretary's order, and that the Board would be remiss if it limited the presentation of facts strictly to the allegations contained in the appellant's Statement of Appeal. Accord T.V. Spano, at 530.

In addition, the Board concludes that as no pre-hearing conference has been held in this matter, ESE and DNREC have not been prejudiced by the interjection of the flight safety issue. Moreover, as more fully stated above, the issue will have been fully addressed in a parallel administrative proceeding by the time this opinion issues.

4) **Motion to Intervene by the DSWA**

By unanimous vote, the Board grants this motion. The Board concludes that the DSWA has an interest in this appeal with common questions of law and fact. Subsequently, its intervention is granted by permission.

According to 7 Del. C. § 6401, the General Assembly declared the use of a coordinated system of solid waste disposal as one of the "environmental goals" of the State. In implementing these goals, it established the DSWA as the arm of the State responsible for developing and implementing a statewide solid waste management plan.

According to 7 Del. C. § 6025, the General Assembly gave the Secretary "exclusive" authority to effectuate, "the purposes of this chapter concerning solid waste, set forth in paragraph (6) of subsection (c) of § 6001 of this title notwithstanding any authority

heretofore conferred upon or exercised by any other state agency...." Section 6001(c)(6) declares as State policy to provide for "[a] program for improved solid waste storage, collection, transportation, processing and disposal by providing that such activities may henceforth be conducted only in an environmentally acceptable manner pursuant to a permit obtained from the Department."

It is evident to the Board that while both agencies have independent statutory and regulatory authority over the disposal of solid waste, their authority and jurisdiction overlap. Given this fact alone, and the potential size of the ESE facility under the permit limits, the DSWA should be involved in this matter as a party.

5) **Motion to Lift the Stay**

By unanimous vote, the Board grants this motion. The Board finds that its original bases for granting the stay are no longer valid. The Board now has a better understanding of the issues (pertinent to the granting of the stay), and the parties are in agreement regarding the nature of the "zoning issue" to be considered by the Board. The issue before the Board is not whether the correct zoning is in place, but rather, whether DNREC–in the process of reviewing this permit--followed its rules and regulations in obtaining proof regarding all applicable zoning approvals. This is not the same legal issue being addressed in the Court of Chancery. Furthermore, based upon representations by the parties, the Board's original assumption that this issue would be resolved by the Court of Chancery in the near future is no longer accurate. Given these findings, the Board concludes that the interests of judicial economy no longer justify the continuation of the stay.

6) **Motion *in limine* on the Flight Safety Issue**

By unanimous vote, the Board denies this motion on grounds of mootness. The Board concludes that the DAFB is the party with the primary interest in this issue. Its intervention as a party makes the presentation of evidence on the issue by Ms. Hegman moot.

7) **Motion *in limine* on the Zoning Issue**

By unanimous vote, the Board grants this motion. The Board finds that this issue was raised in the initial appeal to the Board. Given the Board's understanding of the issue as outlined in number 5) above, evidence on the issue is relevant and material to the question of whether DNREC followed its rules and regulations in reviewing the permit.

8) **Motion *in limine* on Appellant's Motivation for Filing the Appeal**

By unanimous vote, the Board denies this motion. The Board denied ESE's motion to dismiss for lack of standing and concluded that Ms. Hegman has alleged a substantially affected interest. Notwithstanding its conclusion, opposing counsel has a right to elicit answers on cross-examination related to Ms. Hegman's credibility. Having said this, the Board notes that under the Administrative Procedures Act, it has the discretion to limit testimony that is unduly repetitious, immaterial, irrelevant, or addresses issues already determined by the Board. At the hearing on the merits, the Board will utilize its discretion when appropriate.

STATEMENT OF DETERMINATION

Having considered all the arguments of the parties (and potential parties) and their accompanying briefs and memoranda, the Board, by unanimous vote, grants the following motions:

Motion to Intervene by the DAFB

Motion to Intervene by the DSWA

Motion to Lift the Stay

Motion *in limine* on the Zoning Issue

The Board, by unanimous vote, denies the following motions:

Motion to Dismiss for Lack of Jurisdiction

Motion to Dismiss for Lack of Standing

Motion *in limine* on the Flight Safety Issue

Motion *in limine* on Appellant's Motivation for Filing the Appeal

SO ORDERED this 15 th day of May, 2002.

ENVIRONMENTAL APPEALS BOARD

The following Board members concur in this decision.

Robert Ehrlich
Acting Chairman

Date: May 3, 2002

Environmental Appeals Board
Appeal No. 2000-10

Peter McLaughlin
Board Member

Date: 13 May 2002